IN THE GAUHATI HIGH COURT

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

Crl. Rev. Petition No.252/2010

Miss Nandita Konwar,
D/o- Shri Devananda Konwar,
R/o- House No. 11, Chinaki Path,
Rukminigaon, Guwahati-22.

….Petitioner.

-Versus-

1. Sri Utpal Gohain.
2. Sri Mrinal Gohain.
   Both sons of Late Jitendra Nath Gohain.
3. Mrs. Annada Gohain
   Wife of Late Jitgendra Nath Gohain,
   All residents of Kharghuli, Near Borthakur Clinic,
   P.S.- Latasil, District- Kamrup, Assam.
   District- Kamrup, Assam.
4. The State of Assam.

…… Respondents.

BEFORE
HON'BLE MR. JUSTICE C.R. SARMA

For the Petitioners **:** Mr. S.P. Roy,
Advocate

For the respondents**:** Mr. B.M. Choudhury,
Advocate.

Date of hearing **: 03-04-2013**

Date of delivery of
judgment & order **: -06-2013**

JUDGMENT & ORDER (CAV)

By this application, filed under Sections 439(2)/397/407 Cr.P.C., read with Section 482 Cr.P.C., the petitioner, who was the informant in All Women P.S. Case No. 38/2010, under Sections 498(A) and 307 IPC, has

been prayed for cancellation of the pre-arrest bail and the regular bail, granted in favour of the respondents.

(2) The petitioner, on 25.03.2010, as informant, lodged an FIR with the All Women Police Station, Panbazar, Guwahat, interalia alleging that since her marriage in 1994 with the respondent No. 1, her said husband, his brother and the mother, i.e. the respondent Nos. 1,2 & 3 respectively, subjected her to cruelty by torturing her both physically and mentally and threatened to divorce her. She further alleged that, on 24.03.2010, at about 8.30 AM, while she was preparing tea, her said husband, pulling her hairs, dragged her from the kitchen to the dining room and inflicted blows on her head, neck and that he made an attempt to inflict blow, on her head, with a big brass ladle with an intention to kill her, but, somehow, she could save herself from sustaining grievous injury.

On receipt of the said FIR, Police registered a case, being All Women Police Station Case No. 38/2010, under Sections 498(A)/307 IPC.

(3) Apprehending arrest, in connection with the said case, the respondents, as petitioners, approach this Court, seeking pre-arrest, bail by preferring an application, under Section 438 Cr.P.C. The said application was registered as BA No. 1379/2010

(4) A learned single Judge of this Court, on 05.04.2010. while calling for the case diary for final disposal of the bail application, allowed the petitioners to remain on interim bail of Rs.10,000/- each, subject to condition that they should appear before the I.O. within 3 (three) days. On 28.04.2010, this Court, after hearing both the parties and perusing the case diary and also keeping in mind that there was no adverse report against the petitioners, from the date of grant of interim bail, granted pre-arrest bail and accordingly, the interim order, dated 05.04.2010, was made absolute, subject to condition that the petitioners shall cooperate with the investigation. The said bail order was made effective for 4 (four) weeks directing the petitioners to approach the learned Chief Judicial Magistrate, Kamrup, Guwahati, seeking regular bail, with the observation that, on such appearance, the learned Chief Judicial Magistrate shall consider the prayer, as per law.

(5) Accordingly, the petitioners approached the learned Chief Judicial Magistrate, Kamrup, seeking regular bail. The learned Addl. Chief Judicial Magistrate, by his order, dated 11.06.2010, after hearing both the parties and considering the materials, available in the case diary, granted regular bail, in favour of the petitioners.

(6) Aggrieved by the said orders, the informant, as petitioner, has come up with this criminal revision petition.

(7) I have heard Mr. S.P. Roy, learned Counsel, appearing for the petitioner and Mr. B.M. Choudhury, learned Counsel, appearing for the respondents.

(8) Mr. Roy, learned Counsel, appearing for the petitioner, referring to the contention, made in this petition and the original FIR as well as the type copy of the FIR (submitted by the petitioner at the time of preferring pre-arrest bail), has submitted that the respondents, while obtaining the pre-arrest bail, mislead this Court by omitting to reproduce three vital lines of the original FIR in the typed copy of the FIR and that the respondent No. 1 made false statement that he had put up more than 24 years of service without any blemish in his career, despite facing a disciplinary proceeding, in which he was warned to be more careful in future.

(9) The learned Counsel, appearing for the petitioner, has also submitted that, by making such misleading statement, the respondents could obtained pre-arrest bail from this Court and that the learned Addl. Chief Judicial Magistrate also, without considering the objection, raised by the informant in this regard, granted regular bail and thus, committed error.

(10) Mr. Roy, learned Counsel for the petitioner, has submitted that the said bail orders, obtained by the respondents, by making misleading statements, can not be allowed to stand in the eye of law and as such, the bail orders granted by this Court and the learned Addl. Chief Judicial Magistrate are liable to be cancelled and recalled.

(11) The learned Counsel, appearing for the petitioner, has relied on the decision, held in the case of **State (Delhi Administration) – Vs.- Sanjay Gandhi,** reported in **(1978) 2 SCC 411.**

(12) Mr. B.M. Choudhury, learned Counsel, appearing for the respondents, referring to the petitions, filed in the bail applications, made under Section 438 Cr.P.C. before this Court and before the learned Chief Judicial Magistrate, has submitted that no misleading statement was made before the Courts and the Courts passed orders after perusing the case diary, which included the original FIR as well as the materials, collected by the I.O.

(13) Mr. Choudhury, learned Counsel for the respondents, has also submitted that at the time of filing the application under Section 438 Cr.P.C., respondents, along with the typed copy of the FIR, had also submitted a certified copy of the FIR and that, there was bonafide and un-intentional mistake in typing the original FIR from the certified copy, as a result of which three lines, as indicated by the present petitioner, got dropped. It has also been submitted that though the typed copy did not contain the said relevant three lines, which referred to commission of offence of attempt to murder, the certified copy of the original FIR being enclosed, no attempt was made to mislead the Court inasmuch as the Court had ample opportunity to peruse the certified copy of the original FIR, at the time of granting the interim bail.

(14) It is also submitted that, at the time of final disposal of the petition filed under Section 438 Cr.P.C., i.e. at the time of passing the order, dated 28.04.2010, the Court, apart from hearing the learned Counsel, appearing for both the parties, had perused the case diary also. Therefore, it is submitted that, as the case diary had contained the original FIR as well as the materials, collected by the Investigating Agency, there was no question of obtaining the bail order misleading the Court.

(15) Mr. Choudhury has further submitted that in view of passing the order, dated 28.04.2010, by the Court, after perusing the case diary, failure to include three material lines in the typed copy of the FIR, did not amount to misleading the Court.

(16) Regarding the allegation of making false statement regarding the service career of the respondent No. 1, the learned Counsel, appearing for the petitioner, referring to the order, dated 24.04.2009, passed by the Managing Director, LAEDCL, Assam State Electricity Board, has submitted

that though a disciplinary proceeding was initiated against the petitioner, the Managing Director, i.e. the authority concerned, let out the petitioner No. 1 i.e. the charged officer, with a non recordable warning to be more careful in future.

(17) In view of the above order, it is submitted that the disciplinary proceeding, initiated against the petitioner ended in his favour much prior to filing of the application for bail, under Section 438 Cr.P.C. (Bail Application No. 1379/2010). It is also submitted that the said i.e. 'non-recordable warning to be more careful in future,' does not indicate that the petitioner was imposed with any punishment inasmuch as no entry was made in his service record. Therefore, it is submitted that the statement, made by the respondent No. 1, i.e. petitioner No. 1, in the said bail application that he had put up more than 24 years of service without any sort of blemish in his career was not a false or misleading statement.

(18) It is also submitted by Mr. Choudhury, that the order, passed in Bail Application No. 1379/2010, under Section 438 Cr.P.C., was only for a limited period, i.e. for four weeks and that the petitioner was granted the regular bail by the learned Additional Chief Judicial Magistrate, Kamrup, Guwahati, after considering the materials, on record (case diary).Therefore, it is submitted that as the effect of the said pre-arrest bail order expired after four weeks followed by a regular bail order, the prayer for cancellation of the pre-arrest bail order, which ceased to have force, is not maintainable.

(19) Having heard the learned Counsel, appearing for both the parties, it is found that the learned Additional Chief Judicial Magistrate, while granting the regular bail, on 11.6.2011, in favour of the petitioner, after having heard both the parties, considered the materials, on-record and the evidence collected by the Investigating Agency.

(20) As the regular bail was granted by the learned Additional Chief Judicial Magistrate, on the basis of the materials on record, without being influenced by the order, dated 28.04.2010, passed by this Court, in BA No. 1379/2010, the said bail order des not suffer from any illegality. It is found that there is no allegation or material to show that the respondents, after obtaining the said bail order had, in any manner, flouted the terms and

conditions of the bail order or interfered with the investigation or intimidated any person connected with the case. Therefore, there is no material to show that the enjoyment of the liberty, granted to the respondents, was pre-judicial or adverse to the investigation or trial of the case.

(21) In the case of **Sanjoy Gandhi** (supra), prayer for cancellation of bail was made, on the ground of tempering the witnesses. The application for cancellation of bail was dismissed by a Single Judge of the High Court.

Against the said order of dismissal, an appeal was preferred before the Supreme Court. The Supreme Court partly allowed the appeal with certain modification, thereby cancelling the respondents' bail for a period of 1 (one) month.

(22) In the said case, the Supreme Court observed :

> "13. Rejection of bail when bail is applied for is one thing ; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a flair trial to allow the accused to retain his freedom during the trial. The fact that prosecution witnesses have turned hostile cannot by itself justify the inference that the accused has won them over. A brother, a sister or a parent who has seen the commission of crime, may resile in the Court from a statement recorded during the course of investigation. That happens instinctively, out of natural love and affection, not out of persuasion by the accused. The witness has a stake in the innocence of the accused and tries therefore to save him from the guilt. Likewise, an employee may, out of a sense of gratitude, oblige the employer by uttering an untruth without pressure or persuasion. In other words, the

> objective fact that witnesses have turned hostile must be shown to bear a casual connection with the subjective involvement therein of the respondent. Without such proof, a bail once granted cannot be cancelled on the off chance or on the supposition that witnesses have been won over by the accused. Inconsistent testimony can no more be ascribed by itself to the influence of the accused than consistent testimony, by itself, can be ascribed to the pressure of the prosecution. Therefore, Mr. Mulla is right that one has to countenance a reasonable possibility that the employees of Maruti like the approver Yadav might have, of their own volition, attempted to protect the respondent from involvement in criminal charges. Their willingness now to oblige the respondent would depend upon how much the respondent has obliged them in the past. It is therefore necessary for the prosecution to show some act or conduct on the part of the respondent from which a reasonable inference may arise that the witnesses have gone back on their statements as a result of an intervention by or on behalf of the respondent."

(23) In the above referred case, specific allegation of influencing the witnesses, was made and it was found, prima-facie, that the accused person tried to temper the witnesses and as such, his remaining on bail, was not conducive for examination of the witnesses. Therefore, to facilitate the examination of witnesses, without any interference by the accused person, the Supreme Court cancelled the bail of the accused for a period of 1 (one) month from the date of the order.

(24) In view of the above, in order to succeed in an application for cancellation of bail of the accused person, the applicant is required to prima-facie establish that preponderance of probabilities show that the accused person(s) made attempt to temper with the witnesses and that the accused person being at large is detrimental to the interest of proper

investigation or trial. That apart, violation of any terms and conditions of the bail order also can be ground for cancellation of bail.

In the present case, there is no such allegation indicating that the petitioners had, in any manner, attempted to interfere with the investigation or the trial either by tempering the witnesses. There is also no allegation or instance of flouting the terms and conditions of the bail order.

(25) The cancellation of bail has been sought only on the grounds of making misleading statement and suppression of facts, as indicated above. Of course, the petitioner, i.e. the informant, stated that the respondent No. 2 being a member of an International NGO, having well connection with the system and bureaucrats would use his clout and influence to manipulate the case and temper the evidence either by threatening the witnesses or by putting up false witnesses. But there is no specific instance or statement indicating that the respondent No. 2 had done anything or attempted to do anything either for tempering the witnesses or influencing the investigation or trial in his favour.

(26) The learned Counsel, appearing for the respondents, has fairly admitted that the mistake of not mentioning the three important lines in the typed copy was a bonafide and un-intentional mistake, which took place at the time of typing the said copy of the FIR in his chamber and that the bail application as well as the said typed copy of the FIR were accompanied by a certified copy of the original FIR. It is submitted that, in view of submission of the certified copy of the original F.I.R., the Court got sufficient scope to peruse the original FIR and that the respondents did not make any attempt to mislead the Court in any manner. As the copy of the original FIR was enclosed along with the typed copy, I find sufficient force in the contention of the learned Counsel, appearing for the respondents. Had there been any intention to mislead the Court, the respondents would not have enclosed the certified copy of the original F.I.R.. That apart, the type copy also revealed allegation of attempt to murder.

(27) The production of the original copy of the FIR along with the bail application indicates that the bail applicants had no ill intention to mislead the Court. Therefore, I find force in the contention of the learned Counsel for

the petitioner that due to bonafide typographical mistake in typing out the FIR the said lines stood omitted from the typed copy. That apart, at the time of granting the pre-arrest bail, by order dated 28.04.2010, this Court, while hearing the learned Counsel, appearing for both the parties, perused the case diary also. Therefore, the bail was not granted on the basis of the typed copy of the FIR. That apart, the case being registered under Section 498(A) and 307 IPC, the Court had the opportunity to take notice of the fact of the case.

(28) In the typed copy of the FIR, though the relevant portion, i.e. the sentences containing allegations regarding picking up of a big heavy brass ladle and giving blows aiming at the head was omitted, the typed copy also contained the allegation that the accused person No. 1, i.e. the respondent No. 1 had struck a blow with attempt to kill the informant by giving blow and that, for the protection taken by the informant, her skull would have been cracked. Therefore, in my considered opinion, the typed copy of the FIR also contained the allegation of attempt to commit murder.

(29) Therefore, I am of the considered opinion that, failure to reproduce a few material sentences, relating to allegation of attempt to commit murder, in the type copy of FIR, had no bearing in passing the bail order, because the certified copy of the FIR and the case diary containing the copy of the original FIR were available before the Court. Therefore, it can not be held that the respondents obtained the pre-arrest bail by making any misleading statement and keeping the Court in dark about the actual fact.

(30) The second allegation, made by the petitioner, is that the petitioner No.1, despite having faced a disciplinary proceeding, made false statement by stating that he had completed 24 years of service without any ‘blemish.’ That the petitioner No. 1 had faced a disciplinary proceeding, in which some of the charges were found to be proved by the Enquiry Officer are facts. But Disciplinary Authority, by his order, dated 24.04.2009, let out the Charged Officer with a non recordable warning ‘to be more careful in future.’ He passed the following order:

“ I have considered the materials available on record and also considered the plea taken by the Charged Officer. The matter of updation of

cash book in the Sub-division has since been sorted out and there seems to be no financial impropriety on the part of Charged Officer. For these reasons, which were explained in his written statement and also during his personal hearing, he was unable to get the cash book up-dated.

For the reasons above, I would like to let out the Charged Officer with a non recordable warning to be more careful in future."

(31) In the said order, the Disciplinary Authority recorded that there was no financial impropriety on the part of the Charged Officer. The said warning, given to the petitioner was not made liable to be recorded in his service career. Therefore, his service record did not contain anything blemish. In fact, the same was a guidance to be more careful. The term "more careful" indicates that though the petitioner No. 1 was careful, he was required to be more careful.

Hence, I find that the above-mentioned statements, made by the petitioner were not the misleading statements. Therefore, it can't be concluded that the respondents obtained the bail by misleading the Court. Rather the bail orders aforesaid indicate that the orders were passed on merit relying on the materials, on record. That apart, the pre-arrest bail order was effective only for a period of four weeks and thereafter the learned Addl. C.J.M. passed regular bail perusing the case dairy and considering the evidence collected by the investigating officer. Further there is nothing on record to show that the respondents made any attempt ether to temper the witnesses or defied the terms and conditions of the bail orders. Therefore, the prayers, for cancellation of the pre-arrest bail, which was no longer in force and the regular bail are not maintainable.

(32) In view of the above discussion, I am inclined to hold that the petitioner failed to make out a case for cancellation of the bail orders aforesaid. Accordingly this criminal petition is dismissed. No. cost

JUDGE

Kishor